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Cardozo, the Canon and Some Critical Thoughts About Pedagogy

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CARDOZO, THE CANON AND SOME CRITICAL THOUGHTS ABOUT PEDAGOGY

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A few years ago, in an effort to link the right and left sides of the brains of my students, I had them make movies. They were told that they could dramatize any of the cases we had read that semester. A few of the movies were notable for their production values: before there was a LEGO Batman movie,[1] my students used Legos to make a movie about a contractual dispute over the existence of a ghost in a house.[2] Two students, one of whom had been an actor, dramatized the *Baby M* case.[3] But the film that was the most fun, I think, was the dramatization of *Jacob and Youngs v. Kent*.[4]

If you view the beginning of this film,[5] you will note that the student who plays Cardozo, Andrew Koster, begins with a tongue in cheek parody of Cardozo's thought process while writing this opinion. In his role as Cardozo, he engages in self-criticism, noting that he "stayed up all night reading the dictionary" and that he was planning on writing a "verbose opinion" with "words no one can understand" that will be "even more confusing than Palsgraf."[6]

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[*]Professor Emerita, Jacob F. Fuchsberg Law Center, Touro College. I would like to thank Professor Samuel Levine, Director of the Jewish Law Institute, who has organized several conferences over the years, for his invitations to attend and to participate in these conferences. I have enjoyed and benefited from the opportunities I have had to meet so many eminent scholars and hear their presentations.

[1] THE LEGO BATMAN MOVIE (Warner Bros. Pictures 2017).

[2] Stambovsky v. Ackley, 572 N.Y.S.2d 672 (App. Div. 1991).

[3] In re Baby M, 542 A.2d 52 (N.J. Super. Ct. Ch. Div. 1988).

[4] 129 N.E. 889 (N.Y. 1921).

[5] Ara Ayvazian, Ashley Haelen, Peggy Zabakolas, Larry Przetakiewicz, et al., Student film: Jacobs and Young Inc. v. George Kent (2010), http://works.bepress.com/deborah_post/4/.

[6] *See id.* Mr. Koster was referring to a decision written by Cardozo in a tort case. That case, *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928), is also part of the canon and is discussed in other articles in this issue.

For years I have persisted in teaching *Jacob and Youngs, Inc. v. George Edward Kent*, *Wood v. Lucy, Lady Duff-Gordon*,[7] and *Varney v. Ditmars*,[8] which features a dissent by Cardozo, in my Contracts classes, and *Meinhard v. Salmon*[9] in the Business Organizations class. There has always been resistance by students. The students have always complained about Cardozo's literary style. And while Cardozo is firmly ensconced in the canon, probably now and forever more, there is at least one faculty member at another law school who has developed a strategy for dealing with students who find Cardozo's prose impenetrable. He posted a message on the Contracts listserv reporting that he simply "translates" *Jacob and Youngs v. Kent* into "plain English."

I did not reply online, but my immediate reaction was, "Why would you want to do that?" How close could he possibly have come to communicating the ideas that Cardozo expressed? More importantly, why shouldn't students have to read difficult texts, even texts that on the first, second, or even third reading may seem incomprehensible to them? In response to Mr. Koster, as a representative of dozens of students I have taught over the years, and any contracts professors who feel it is necessary to translate Cardozo for students, I would simply say that these are not "words that no one understands." And yes, one might need a dictionary to look up unfamiliar words, but what is wrong with expanding one's vocabulary?[10] Of course, I recognize that these complaints are not

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[7] 118 N.E. 214 (N.Y. 1917).

[8] 111 N.E. 822 (N.Y. 1916).

[9] 164 N.E. 545 (N.Y. 1928).

[10] One of my first jobs after graduating from college was a secretarial position. I worked for Robert Rahtz, Executive Editor of the school book division at Macmillan Publishing Company. While I was there I witnessed what I would characterize as the "dumbing down" of grade school and high school textbooks. Competition among publishers for adoptions by various states was intense. As part of an effort to compete, publishers asked authors to respond to declining reading levels. The effort to make textbooks easier to read (smaller words required—no three syllable words allowed), as some scholars at the time noted, had unfortunate consequences. As experts noted:

> Textbooks had become too easy for the optimal development of reading, particularly for students reading at grade level and above. The analysis of textbooks published during the 1970s showed that many for the eleventh and twelfth grades were written at ninth or tenth-grade reading level, while the reading passages on the SATs were written on the eleventh or twelfth-grade level. . . . Although easier books may lead to better comprehension, they also, if too easy, lead to slower reading development.

REBECCA BARR, DAVID PEARSON, MICHAEL L KAMIL, PETER B. MOSENTHAL, HANDBOOK OF READING RESEARCH, VOL. 2, 133 (1991).

simply about vocabulary. They are a symptom of a problem that is much more serious.

A very important part of legal education in the first year is, or should be, an introduction to the history and traditions of the profession. Cases read in the first year provide a template for legal analysis and an introduction to legal doctrines. They also introduce students to the great minds that have shaped the law, decisions that have transformed the law, and with a little effort, to the events in the lives of people whose disputes become jural dramas, the performance of which might be a first world version of "normative communitas."[11]

Judge John Noonan, in his book, *Masks of the Law*, notes that law had been taught in the past using "presentations to students of imaginary characters, 'hypotheticals' in which imaginary characters get into the legal difficulties the teachers wants to explore . . . where depersonalized actors illustrate the issues."[12] This method, he notes, is "an excellent one for exploring doctrinal alternatives with strict impartiality."[13]

Noonan's criticism extends to the case method when the people who are parties to the dispute are completely depersonalized. He argues that judicial opinions are not "concrete enough" and the parties "lose personal identity."[14] The problem with this approach, he suggests, is that decontextualized cases do not "contribute to the moral education essential to the professional preparation of lawyers."[15] Students fail to develop the "sense of responsibility of those who by their thought and action make the system exist."[16]

I will simply note that this is not a matter of historical interest, a criticism of contemporary jurisprudence or casebooks from which we teach, but also a description of a methodology currently used on the essay portion of the uniform bar exam and especially on the multiple choice questions. Of course, depersonalized and oversimplified

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[11] VICTOR TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 131-65 (1969).

[12] JOHN T. NOONAN, JR., *Forward*, *in* PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE Masks IX (1976).

[13] *Id*.

[14] NOONAN, *supra* note 12, at xix.

[15] NOONAN, *supra* note 12, at xix.

[16] NOONAN, *supra* note 12, at xix.

hypotheticals are often used in law school assessments as well as the bar exam.[17]

The accrediting body for law schools, the Council on Legal Education and Admission to the Bar, places a great deal of weight on bar passage rates for schools.[18] The response by faculty at many schools has been to adopt teaching techniques that emphasize doctrinal competence. Among the most pernicious is the strategy of "flipping the classroom."[19] Notably, "flipping" is all about doctrinal competence and features exactly the sort of hypotheticals Noonan criticized.[20] Flipping the classroom is billed as "experiential learning" but apparently the "experience" of reading, dissecting, translating, and

[17] Examples of some of the hypotheticals used in the bar examination can be found at the website for the Uniform Bar Exam, http://www.ncbex.org/exams/ube.

[18] The fight over bar passage rates is one of many issues precipitating the crisis in legal education. These issues include the cost of legal education, declining applications for admission, changing measures for determining who is qualified to attend law school, and bar passage rates for schools and placement in law related jobs. Last year the Council on Legal Education and Admission to the Bar attempted unsuccessfully to adopt a higher standard for the rate at which graduates pass the bar examination. The Council had been threatened with loss of its accrediting authority by a recommendation to the Department of Education by the National Advisory Committee on Institutional Quality and Integrity. Kyle McEntee, *Transcript Reveals Debate over ABA's Accrediting Power*, BLOOMBERG L. (Aug. 3, 2016), https://bol.bna.com/transcript-reveals-debate-over-abas-accrediting-power/. An attempt by the Council to increase the number of graduates who must pass the bar if a law school is to maintain its accreditation was defeated by the American Bar Association House of Delegates. In the end, this is as much a fight about admission standards – who should be admitted to law school – as it is about bar passage. Stephanie Francis Ward, *ABA House Rejects Bar Exam Proposal* ABA JOURNAL (APR. 2017), http://www.abajournal.com/magazine/article/aba_house_rejects_bar_exam_proposal; Memorandum, American Bar Association, Managing Director's Guidance Memo (August 2016), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_august_guidance_memo_S316.authcheckdam.pdf.

[19] Daniel B. Rodriguez, *The Flipped Classroom*, NW. L.: WORD ON THE STREETERVILLE (Sept. 6, 2013), https://deansblog.law.northwestern.edu/2013/09/06/the-flipped-classroom/ ("At the law school, we began experimenting with flipped classrooms last year for a traditional Contracts/Sales class. Prior to class, students watched narrated PowerPoint lectures, worked in online discussion groups to solve hypothetical problems, and worked through problems from the assigned textbook. While in class, students worked in teams on professor-assigned problems, presented group projects to the class, and interacted with the professor on a class-wide problem. The professor gave short, focused lectures on the more challenging topics for reinforcement. The professor who taught the flipped class noted that students came to class better prepared and the quality of responses to questions was notably high. Moreover, the quality of the exam answers was higher than in the traditional course counterpart.").

[20] Catherine A. Lemmer, *A View from the Flip Side: Using the "Inverted Classroom" to Enhance the Legal Information Literacy of the International LL.M. Student*, 105:4 L. LIBR. J. 461, 464 (2013).

organizing case law is not a skill featured in this methodology.[21] Nor is there much discussion of the broader issues of culture, history and social change that can be addressed during a discussion of cases that are part of the canon.

I agree with Judge Noonan. Even if these denuded hypotheticals are a more efficient way to prepare students for the bar exam, a great deal would be lost if the case method were completely abandoned. The "moral education" to which he refers cannot occur in schools where the opinions of Cardozo in cases such as *Jacob and Youngs v. Kent*, *Meinhard v. Salmon*, and even *Lucy, Lady Duff-Gordon*, which references a contract that Cardozo found to be "instinct with obligation,"[22] are not part of the curriculum. Without the case law method, graduates of law school would be armed with a degree and only a superficial understanding of what it means to be a part of a community that has a history, tradition and culture that is unique to our profession.

I have my favorite judges. Roger Traynor among them, not only because of his decisions in *Drennan v. Star Paving*[23] and *Pacific Gas and Electric Co. v. G.W. Thomas Drayage and Rigging Company*,[24] but because in 1948, as chief judge of the Court of Appeals in California, he wrote the majority opinion in *Perez v. Sharp*,[25] declaring California's anti-miscegenation unconstitutional twenty years before the Supreme Court reached the same conclusion in *Loving v. Virginia*.[26] But for teaching purposes, I believe none can compare to Cardozo.

There are always new decisions that should be added to the canon; cases that prompt us to consider our basic values and our commitment to deeply held beliefs. Judge Frank Easterbrook turned the world of contracts upside down when he changed the rule that the "offeror is master of the offer" to "the vendor is master of the offer."[27] The decision was controversial and sparked a lengthy discussion

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[21] Jackie Gerstein, *Flipped Classroom: The Full Picture for Higher Education*, USER GENERATED EDUCATION (May 15, 2012, 11:14 PM), https://usergeneratededucation.wordpress.com/2012/05/15/flipped-classroom-the-full-picture-for-higher-education/.

[22] *Lucy, Lady Duff-Gordon*, 118 N.E. at 214 (quoting McCall Co. v. Wright, 133 A.D. 62, 68 (N.Y. App. Div. 1909)).

[23] 333 P.2d 757 (Cal. 1958).

[24] 442 P.2d 641 (Cal. 1968).

[25] 198 P.2d 17 (Cal. 1948).

[26] 388 U.S. 1, 12 (1967).

[27] Hill v. Gateway, 105 F.3d 1147, 1149 (7th Cir. 1997).

among law school professors.[28] It was a decision in which one judge changed a fixed legal principle to set the stage for an examination of the relationship between buyer and seller in an era of mass merchandising and online sales. Although I disagree with the opinion in that case (and maybe the hubris of Easterbrook as well),[29] his decision in the *Gateway* case absolutely should be part of the canon in contracts. But I believe Cardozo and his decisions in contracts and business organizations are singularly important because they combine a deep knowledge of the world of commerce with explicit references to norms that operate to curb exploitation of a less powerful party.

Even more important is the opportunity that a Cardozo decision provides to really explore the deliberative process that judges use to decide a case and the strategies that are employed in writing an opinion that is persuasive. The post on the contracts listserv to which I referred earlier and the reaction of my own students to Cardozo opinions reflect a new reality confronting law schools. Law schools are professional schools and law is a graduate program. Too much of the intellectual content, the philosophy of law, has been stripped from the curriculum.

Too little attention is paid to the deliberative process in judicial decisions. I have always thought that the first semester of the first year would be the best place to offer students a course that focuses on jurisprudence. Instead, law students are focused on pulling the "rule" or "doctrine" from a case and with a mechanical process of applying the rule or doctrine in other hypothetical cases. The idea that "drills" are helpful in teaching the law has preempted discussions of how and why judges reason their way to a particular conclusion and why and how a dissenting judge could examine the same facts and reach the opposite conclusion.[30]

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[28] The Gateway Thread was published as a symposium issue. Symposium, *Common Sense and Contracts Symposium*, 16 TOURO L. REV. 1037 (2000). The actual American Association of Law Schools thread can be found at *The Gateway Thread – AALS Contracts Listserv*, 16 TOURO L. REV. 1147 (2000).

[29] *Gateway* laid the foundation for a series of decisions that I believe eliminated proof of actual assent and replaced it with the concept of a "rolling contract" and presumed assent by the buyer if the seller disclosed the terms in a way that gave the buyer reasonable notice and clear instructions on how the offer could be rejected. *See, e.g.*, Nguyen v. Barnes and Noble Inc., No. SACV 12-812-JLS (RNBx), 2015 WL 12766050 (C.D. Cal. Nov. 23, 2015) and DeFontes v. Dell Comput. Corp., No. C.A. PC 03-2636, 2004 WL 253560 (R.I. Super. Jan. 29, 2004), *aff'd*, 984 A.2d 1061 (R.I. 2009).

[30] I think one of the most pernicious inventions in legal education has been the introduction of formulae, IRAC and CREAC, which suggest that legal reasoning is a mechanical process. They are reductive and misleading. I realize that lists have a long history in literature about legal analysis. Karl Llewelyn's lectures on the legal process are an early example and his

Cardozo's Nature of the Judicial Process,[31] a series of speeches delivered to law students but no longer read by students, provides some insight into the way Cardozo decided cases. The best judges then and now probably proceed in much the same way. He began with the premise that the law is not static; that the principles and doctrines our students struggle to master and memorize today might be altered by a judge sometime in the future. The case law method should never be simply an exercise in pulling out the rule or doctrine. Cases should be examined in a way that helps students understand the reasoning and the various kinds of arguments that judges use to justify their decisions.

Thinking about Cardozo's description in The Nature of the Judicial Process of the role of philosophy, history and sociology in judging would be instructive.[32] Students might benefit from reading his discussion of the way judges try to reconcile what seem to be conflicting rules, how they might respond when changes in society raise the issue of obsolescence with respect to a doctrine or legal rule, how a judge might take into consideration the relationship between a common law doctrine and the cultural beliefs and values in a community, or what a sense of justice requires in a particular case.[33]

I was not at all surprised to read that Cardozo majored in the humanities when he was a student at Columbia.[34] Nor was I surprised to find that he understood the juridical importance of the social sciences or that his book, The Nature of the Judicial Process, describes a methodology that is rooted in philosophy, history and sociology. Current law students, however, are impatient or even openly hostile to the humanities.[35]

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strategies have been replicated and rejected by others who conceived of a better way to teach legal analysis. *See, e.g.*, Paul Wangerin, *Skills Training In "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 469-71 (1986) (replicating in simplified fashion Llewelyn's "recipe" for legal analysis). *See also* Alan D. Hornstein, *The Myth of Legal Reasoning*, 40 MD. L. REV. 338, 347 n.9 (1981).

[31] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[32] *Id*.

[33] *Id.* at 16.

[34] *See generally* Biography.com Editors, *Benjamin Cardozo*, BIOGRAPHY.COM, (Aug. 6, 2017), https://www.biography.com/people/benjamin-cardozo-40728.

[35] *See, e.g.*, Ariela J. Gross, *Teaching Humanities Softly: Bringing a Critical Approach to the First Year Contracts Class Through Trial and Error*, 3 CAL. L. REV. CIRCUIT 19, 20 (2012). In this article, Professor Gross discusses her attempt to use the casebook, CONTRACTING LAW, I wrote with Amy Kastely and Sharon Hom, which she describes as a "critical race feminist casebook" that "engages" the humanities with literature and history and social science. The article notes that her students "hated it" and every class that "appeared to depart from black letter law." *Id*.

That should not be surprising given the changes that have occurred at colleges and universities across the country. Reports vary, but all seem to agree that the number of degrees conferred in the humanities has been declining for some time.[36] Somewhere between 7% and 15 % of college graduates major in the humanities.[37]

Defenses of the humanities and social sciences, of a liberal education generally, have been offered over the years. Articles debating the importance of the humanities have appeared in the *Chronicle of Higher Education*[38] and *Inside Higher Ed*.[39] The American Academy of Arts and Sciences defends the humanities and social sciences as essential to a "vibrant, competitive and secure nation."[40] Anthony Kronman, former Dean of Yale Law School, argues that an understanding of the meaning of life can be found in the "careful but critical reading of the great works of literary and philosophical imagination."[41] Nicholas Kristof suggests that "the humanities are not only relevant but also give us a toolbox to think seriously about ourselves and the world,"[42] and Fareed Zacharia has written a book *In Defense of a Liberal Education*.[43] But it may be too late. The tide turned a long time ago. Few students today receive the kind of education Cardozo had at home or at Columbia. I would

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[36] Scott Jaschik, *The Shrinking Humanities Major*, INSIDE HIGHER ED (Mar. 14, 2016), https://www.insidehighered.com/news/2016/03/14/study-shows-87-decline-humanities-bachelors-degrees-2-years.

[37] *Id.*

[38] John McCumber, *How Humanities Can Help Fix the World*, THE CHRONICLE OF HIGHER EDUCATION (Oct. 2, 2016), http://www.chronicle.com/article/How-Humanities-Can-Help-Fix/237955.

[39] W. Robert Connor, *The Shrinking Humanities*, INSIDE HIGHER ED (Jan. 4, 2013), https://www.insidehighered.com /views/2013/01/04/essay-importance-understanding-history-humanities.

[40] COMMISSION ON THE HUMANITIES AND SOCIAL SCIENCES, AMERICAN ACADEMY OF ARTS & SCIENCES, THE HEART OF THE MATTER: THE HUMANITIES AND SOCIAL SCIENCES FOR A VIBRANT, COMPETITIVE, AND SECURE NATION (2013), http://www.humanitiescommission.org/_pdf/hss_report.pdf.

[41] He also noted that he has seen "how studying English, history, art and languages gives our students entree into cultures and callings. By connecting diverse ideas and themes across academic disciplines, humanities students learn to better reason and analyze, and to communicate their knowledge, creativity and ideas." ANTHONY KRONMAN, EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE (Yale Univ. Press 2007).

[42] Nicholas Kristof, *Don't Dismiss the Humanities*, N.Y. TIMES (Aug. 13, 2014), https://www.nytimes.com/2014/08/14/opinion/nicholas-kristof-dont-dismiss-the-humanities.Html?mcubz=1.

[43] FAREED ZACHARIA, IN DEFENSE OF A LIBERAL EDUCATION (2015).

speculate that most of them did not have the kind of education I received at Hofstra University in the 1970s.

While I cannot say definitively that the problems we see in law schools today are linked to the decline in the number of students who major in the humanities, I can say that students are struggling in a way they have not in the past. Many seem to lack the skills that are thought to be associated with a study of philosophy, history, literature, or the social sciences – critical thinking, an understanding of the human condition, and an ability to engage in moral reasoning. These skills, if not essential to the practice of the law, at least provide an advantage to those lawyers and law school graduates who have them.

The case which is the subject of this essay, *Jacob and Youngs v. Kent*, no matter how florid some of the language might seem, illustrates both critical thinking and moral reasoning.[44] It is our job as faculty to lead them through the case; to take the case apart and consider its structure and the arguments that build to the conclusion Cardozo reaches. It may be helpful to provide students with background – a brief foray into jurisprudence. Consider the way Cardozo treats the case in *The Nature of the Judicial Process*.[45] He includes it in the first lecture, *The Method of Philosophy*, as an example of the way judges attempt to "square their justice with their logic." [46]

Cardozo's definition of philosophy focuses on logical reasoning, contrasting inductive and deductive reasoning, emphasizing the synergy or interaction between the two.[47] There should be fidelity to legal principles but an acknowledgement that there are often competing principles. These can be used as "a weapon . . . hewing a path to justice."[48] Cardozo rejects outright the idea that doctrines or legal rules are absolute and inviolable. These are "evils and dangers" that have "touched the common law only here and there, and lightly."[49] Cardozo embraces the idea of change or evolution of the legal rules or doctrine "adapting themselves to the ever varied and changing exigencies of life."[50] Of course the law does not adapt itself. Judges are in the business of "adapting" the common law. This discussion

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[44] *Jacob & Youngs, Inc.*, 129 N.E. at 889.

[45] CARDOZO, *supra* note 31.

[46] CARDOZO, *supra* note 31, at 44.

[47] CARDOZO, *supra* note 31, at 22-23, 46.

[48] CARDOZO, *supra* note 31, at 45.

[49] CARDOZO, *supra* note 31, at 46.

[50] CARDOZO, *supra* note 31, at 46-47 (quoting FRANÇOIS GÉNY, *Revue du droit public*, at 127 (1895)).

makes some students uncomfortable. Students want certainty. They are uncomfortable with the suggestion that rules are not absolute. They want to know that there is a "right answer" which is why a discussion of Cardozo's judicial philosophy is an important entree into this case.

The case provides an opportunity to return to the issue of justice. By the time most casebooks reach the topic of substantial performance, a consideration of "justice" as an element of proof has been discussed in connection with the doctrines of promissory estoppel and promise for a past benefit. Students are familiar with the question "what does justice require?" A discussion of justice, if not explicit, is certainly implicit in Cardozo's opinion.[51] There is no reference to reliance or unjust enrichment, but there is a discussion of forfeiture – the contractor's loss of an expected payment and, if the breach is immaterial, the retention by the owner of money that should have been paid.[52]

What students might not see is the significance of structural inequality in this case and in the way Cardozo lays out the facts of the case. He does this without an explicit reference to an attempted abuse of power. I believe he did the same in *Lucy, Lady Duff-Gordon*, although feminists take issue with the manner in which he trivializes her success and paints a picture of her as a "nasty woman."[53] "Structural" inequality is not about the relative power of two people, but the relative power of individuals who are in a particular relationship with one another.

The statement of the facts at the very beginning of the case communicates this disparity in power and suggests that the defendant, to use a term that has some currency at this moment in time, is "stiffing" the plaintiff.[54] A wealthy man enters into a contract for the construction of a mansion in Jericho, Long Island, and after living in this house for a year, he discovers, after a demand for final payment has been made by the contractor, that non-conforming pipe has been

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[51] Amy B. Cohen, *Reviving Jacob and Youngs, Inc. v. Kent: Material Breach Doctrine Reconsidered*, 42 VILL. L. REV. 65, 77 (1997) (discussing how Benjamin N. Cardozo's opinion promoted justice).

[52] *Jacob & Youngs, Inc.*, 129 N.E. at 890.

[53] Mary Jo Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV, 1065 (1985). A discussion of Cardozo's skills as a writer and the characterization of Lucy, Lady Duff-Gordon as a "nasty woman" first appeared in Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637 (1962).

[54] *Jacob & Youngs, Inc.*, 129 N.E. at 890.

used in the construction of the house.[55] But, as Cardozo has noted, this was not a "one off" incident of exploitation.[56] In *The Nature of the Judicial Process* Cardozo explained that the doctrine of substantial performance was "often applied" for the "protection of builders who in trifling details and without evil purpose have departed from their contracts."[57]

"Stiffing" is not a legal term but it is one that has resonance in the current political climate. It popped up on the contracts listserv in a discussion of Donald Trump's failure to pay the contractors who worked on his casinos and hotels or to repay the banks that lent him the money to build them.[58] I am happy to report that the contracts professors on the contracts listserv did not think "stiffing" could be justified or rationalized as an efficient breach. I think it is safe to say that a person reading Cardozo's statement of the facts in *Jacob and Youngs v. Kent* would probably come away with a sense that there is something unseemly in Kent's behavior, some attempt to manufacture a reason to not pay the contractor.[59]

Both the majority opinion, written by Cardozo, and the dissent, written by Justice Chester B. McLaughlin, discuss the factual support for the application of the doctrine of substantial performance in this case.[60] The disagreement has to do with the methodology applied to determine whether performance is substantial. Cardozo uses a

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[55] *Id*.

[56] *Id*.

[57] CARDOZO, *supra* note 29, at 44 (1921).

[58] Alexandra Berzon, Election 2016 Trumps Business Plan Left Unpaid Bills, WSJ A5, June 10, 2016 ("Donald Trump often boasts on the presidential campaign trail that hardball tactics helped make him a successful businessman. His methods have also left behind bitter tales among business owners who say he shortchanged them"). Shawn Tully, *Donald Trump Got a Tax Break for Stiffing Contractors*, FORTUNE (Oct. 8, 2016), http://fortune.com/2016/10/08/donald-trump-taxes-contractors/ ("Much has already been written about the fact that Trump's multiple bankruptcies stiffed a long-list of small businesses, from carpet suppliers to chandelier distributors to cabinet-makers for slot machines. What hasn't been reported before is that those unpaid bills were also used to swell Trump's future tax deductions. In other words, Trump not only stiffed many contractors, he also created a tax benefit off the backs of the tradesmen who built his casinos and skyscrapers."). *See also* Jonathan O'Connell, *Two Contractors Allege Getting Stiffed for Work on Trump's D.C. Hotel*, WASHINGTON POST, (JAN. 5, 2017), https://www.washingtonpost.com/news/digger/wp/2017/01/05/two-contractors-allege-getting-stiffed-for-work-on-trumps-d-c-hotel/.

[59] *Jacob & Youngs, Inc.*, 129 N.E. at 890.

[60] Justice McLaughlin argued that the contract contained an express condition and, therefore, the doctrine of substantial performance would not apply. He then proceeded to challenge Cardozo with respect to substantial performance on the facts. *Id*. at 892-93 (McLaughlin J., dissenting).

qualitative analysis and the dissent opts for a quantitative measure.[61] Were the pipes used the same quality as the Reading pipes included in the specifications by the architect or is the test the amount of pipe that is not of Reading manufacture?

I think cases that have a majority and dissenting opinion are important. This is where an ideological divide becomes visible and where the way in which facts are interpreted and characterized becomes apparent. This is where students have a chance to examine competing world views and examine their own values and beliefs. This is a decision in which students can be asked to examine what they believe to be "a standard of right conduct" or "customary morality."[62]

There are many who are uncomfortable with discussions of morality with respect to contract, particularly with any discussion of morality that might be conceived as a standard of behavior that is assumed to be universal or rooted in religion and one which is narrower, limited to the business community or a particular trade.[63]

When I teach *Jacob and Youngs v. Kent*, I am always amazed when students cannot find the four-part test that Cardozo lays out in the decision.[64] They do not see the guidance he provides on how the test can be applied – laying out useful distinctions between complex and simple contracts, contracts that are utilitarian and those that have an aesthetic component.[65] They are waylaid by the discussion of conditions (constructive conditions versus express conditions, dependent versus independent promises, and covenants or conditions).

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[61] *Id.* at 891.

[62] CARDOZO, *supra* note 31. At this point in the semester students have already seen several references in cases to Corbin's treatise on contracts. Our casebook includes a long quotation from Corbin's treatise with a statement that "a just and reasonable man will not insist upon profiting by the other's mistake." Corbin's assumptions about the "mores" (a term with which most students are unfamiliar) that govern human behavior, the behavior of "just and reasonable," or Cardozo's belief in a shared culture with respect to right and wrong behavior, can and should be explored with students.

[63] *See, e.g.*, RICHARD POSNER, CARDOZO, A STUDY IN REPUTATION, 20-33 (1990). It seems to me that Posner bridles at the use of terms like "mores of the community" dismissing what Cardozo calls the method of sociology as unfortunate because sociology is a "failed social science." Ultimately, though, he concedes "In default of clear-cut positive law, people will act in accordance with the standards of their commercial and other communities. Insofar as the law incorporates those standards it will not defeat people's reasonable expectations, as it might do if it imposed technical, counterintuitive, little known norms upon the lay communities." *Id*. at 31.

[64] *Jacob & Youngs, Inc.*, 129 N.E. at 890.

[65] *Id.*

But what they miss completely is the connection that is drawn between what is morally right and the legal rule that is being applied.

Cardozo's opinion links injustice, oppression and forfeiture. I like to point out to students the explicitly moral, even religious, language in this case. Cardozo distinguishes between a willful transgression and innocent or venial faults. He references atonement and mercy in connection with breaches that are innocent and unintentional. More important, I believe, is the link that is created between intent, reason and morality. There is in Cardozo's opinion a reference to "presumptive intent" – the intent of a party to a contract to be reasonable. If this intent is imputed to a party, in this case, the homeowner, Kent, it operates in a way that both acknowledges human imperfection and cures it.[66] According to Cardozo, a party does not intend, in the absence of "sure and certain" words, to demand perfection.[67] And so Kent certainly could not have intended to make the use of Reading pipe an express condition of the contract.

Who are the "right-minded men and women" whose "customary morality" Cardozo seeks as an objective standard in deciding cases?[68] This standard then is not "idiosyncratic" but he hedges a little when he says that "a duty to conform to the standards of the community, the mores of the times" does not preclude or prevent a judge from "raising the level of prevailing conduct."[69] This is a significant point of engagement with students.

What community are we referencing? In this moment in time when the social fabric seems to have been shredded and "community" has become fragmented, is it possible to find shared values or to decide what behavior should be repudiated? The question Cardozo poses is one of contractual "intent." The "reasonable person" ubiquitous in legal analysis is joined by Cardozo to the issue of intent. In our contractual relationships do we expect "perfection" or do we intend only to ask for and receive from one another a good faith effort that approximates perfection? Human beings are, by their very nature, imperfect. Perfection might be unattainable.

Students disagree. Like Judge McLaughlin, they feel they are entitled to ask for perfection. Their examples, influenced no doubt by the case before them, usually involve Anderson or Pella Windows. If,

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[66] *Id*. at 891.

[67] *Id.*

[68] CARDOZO, *supra* note 29.

[69] CARDOZO, *supra* note 29.

however, you interrogate them with respect to the standards that should be applied to them in their performance as students in law school, it is a different matter. Should a student get an F if he or she misses a deadline for submitting a paper; is an F an appropriate grade if facts are misstated or, as I have seen more and more often of late, when the student makes up facts that allow her to make an argument that otherwise would not apply.

I believe that the core concept or idea that is expressed in Cardozo's opinion – linking fairness, justice and reasonableness with "presumable intention" -- with our better selves -- is the reason why this decision has such staying power. Intent and reason are linked and reason incorporates concepts of fairness and justice. But this exploration of Cardozo's jurisprudence is not simply a matter of finding the test for "substantial performance" and applying it to other hypotheticals. Cardozo's opinion can and should prompt a more extended discussion of the role of law, the existence of shared values, and the process by which lawyers and judges regulate commercial relationships.